PEMBINAAN KSY SDN. BHD.

v.

SYKT. FEDERAL FURNITURE CONSTRUCTION & ENGINEERING WORKS

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
AJAIB SINGH SCJ
MOHD. JEMURI SERJAN SCJ
[CIVIL APPEAL NO. 64 OF 1988]
20 DECEMBER 1990

CONTRACT: *Main contract - Sub-contract - Progress payments - Default - Interpretation of clauses in sub-contract as to suspension of works.*

CIVIL PROCEDURE: *Admission of fact - Counterclaim - dismissal on affidavit evidence - Trial - Rules of the High Court 1980, O. 27 r. 3.*

The respondents F were appointed as sub-contractors by the appellants KSY (main contractors) to manufacture furniture for HP which was under construction; HP was owned by LS. F claimed that KSY had failed to pay the progress payments due under certificates of interim payments Nos. 29, 30 and 31. KSY contended that these 3 certificates had been superceded by certificate No. 40 which reduced the amounts due, that F had failed to remedy defects and that KSY did send a cheque for RM18,000 to F which was returned by F; KSY claimed damages for breach of contract (as a result of an injunction obtained by F).

On 2 July 1987, based on a letter dated 4 July 1986 from KSY to LS whereby KSY admitted F's claim under certificate Nos. 29, 30, 31, F applied for judgment under O. 27 r. 3. (admissions of fact) Rules of the High Court 1980 (RHC). The Senior Assistant Registrar (SAR) dismissed F's application - on appeal, it was allowed and KSY's counterclaim was also dismissed. The appellants KSY now appeal.

Held:

[1] The Court affirmed the trial Judges' interpretation of clause 11(b) and 11(e) of the sub-contract and his holding that it was not clarified as to how the amendments (in relation to certificate No. 40) could contradict the admission by the appellants in their letter of 4 July 1986 to LS - "an architect cannot unilaterally repudiate or invalidate the initial certificate".

[2] The interpretation which must be given to clause 11(e) therefore is that during the period the suspension is in force, the contractor is not permitted to take another sub-contractor to carry on the suspended works.

[3] The counter claim ought not to have been dismissed out of hand merely on affidavit evidence and it should go for trial.

[Appeal dismissed; counterclaim to be heard on merits.]

Legislation referred to:
Rules of the High Court 1980, O. 27 r. 3.

For the appellants/defendants - PS Gill; M/s. Gill & Tang
For the respondents/plaintiffs - Lim Kean Chye (YT Ling with him); M/s. YT Ling & Co.

JUDGMENT

Ajaib Singh SCJ:

This is an appeal against the decision of the High Court whereby it had allowed the plaintiff's/respondent's appeal with costs against the order of the Senior Assistant Registrar who had dismissed the plaintiff's/respondent's application to enter judgment on admissions of fact under O. 27 r. 3 of the Rules of the High Court. The High Court also dismissed the counter claim by the appellants/defendants with costs.

Order 27 r. 3 reads as follows:

> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to without waiting for the determination of any other question between the parties and the Court may give such judgment or make such order on the application as it thinks just. An application for an order under this rule may be made by summons.

The plaintiffs/respondents (Syarikat Federal Furniture Construction and Engineering Works) were appointed as sub-contractors by the defendants/appellants Pembinaan KSY Sdn. Bhd. (the main contractors), to manufacture furniture for Hotel Plaza in Kuala Lumpur which was under construction. The owners of the hotel are Lian Seng Properties Sdn. Bhd. In their statement of claim the plaintiffs/respondents averred *inter alia* that:

> By a sub-contract in writing dated 17 February 1986 made between the defendant and the plaintiff the defendant engaged the plaintiff to design, supply and instal wardrobe and kitchen cabinet complete with equipment and accessories to Apartment Block for the proposed Kuala Lumpur Plaza for Lian Seng Properties Sdn. Bhd., at the price of ringgit one million five hundred and twenty five thousand (RM1,525,000) or such sums as shall become payable thereunder at the times or in the manner specified therein.
>
> The plaintiff has completed certain portion of the works for which the architect concerned has issued three certificates of interim payments details whereof are as follows:

Certificate No.	Dated	Amount Due
29	6 November 1985	RM139,500
30	28 November 1985	RM241,850
31	26 December 1985	RM187,400
	Total	RM568,750

> Pursuant to clause 11(b) of the contract it is expressly provided that the defendant shall within 14 days of the receipt of the progress certificate payment (hereinafter called the said certificates) from the architect shall pay to the plaintiff the amount therein specified in respect of the said work.
>
> In breach of the paragraph abovementioned the defendant has failed or neglected to pay the sum of RM568,750 being the total amount due under the aforementioned certificates of interim payments Nos. 29, 30 and 31.
>
> It is a customary practise that interest shall be calculated on overdue accounts payments. The defendant is indebted to the plaintiff in the sum of RM67,958.61 being the interest rate on overdue accounts payments at the rate of 14.5% per annum.

In their statement of defence and counter claim the defendants/appellants denied the claim and averred *inter alia* as follows:

- that the aforesaid certificates Nos. 29, 30 and 31 have been superceded by an interim certificate No. 40 dated 21 January 1987 issued by the architect of the main contract;

- that certificate No. 40 had drastically deducted certificates Nos. 29, 30 and 31 by a total sum of RM302,520;

- that by several progress payments, advances made by the plaintiff, direct payment by the employer Messrs Lian Seng Properties Sdn. Bhd., and the security deposit and/or performance bond as provided for under the sub-contract the total sum (which is denied) due to the plaintiff is in the sum of RM18,680 only;

- that the defendant forwarded several letters to the plaintiff requesting them to remedy all defects, shrinkage or other faulty works but despite the aforesaid the plaintiff has failed, refused and/or neglected to remedy the same;

- that despite the fact that the plaintiff have failed, refused and/or neglected to remedy the abovementioned errors the defendant did *vide* their letter dated 17 February 1987 forward the said sum of RM18,680 to the plaintiff *vide* a United Malayan Banking Corporation cheque serial No. 141600 but the same was returned by the plaintiff.

- That in view of the aforesaid premises the defendant is not obliged in law or in fact to make payment toward the plaintiff in respect of interim certificate Nos. 29, 30 and 31.

In their counter claim they claimed special damages in the sum of RM369,000 as liquidated damages plus general damages for breach of contract:

In accordance with the terms of the sub-contract the plaintiff was obliged to complete the works within the stipulated period unless there is an extension of time granted by the architect employed under the main contract.

In breach of the sub-contract the plaintiff has failed, refused and/or neglected to proceed with its works and further wrongfully wholly suspended the carrying out of the said sub-contract works.

In further breach of the sub-contract the plaintiff have failed, refused and/or neglected to proceed with the defect, shrinkage and faulty works as stipulated in the sub-contract.

In accordance with the sub-contract the defendant did notify the plaintiff to proceed with the balance works of the sub-contract failing which the defendant would determine the employment of the plaintiff.

The plaintiff had on 27 March 1987 obtained an *ex parte* injunction refraining the defendant from appointing a new sub-contractor and were thus prevented from mitigating its losses and to honouring its obligations both under the main contract and to other sub-contractors.

The said injunction was only dissolved on 6 May 1987.

The defendant have suffered loss and damages from the breach of contract by the plaintiff and damages resultant from the injunction.

Wherefore the defendant prays for:

(i) special damages in sum of RM369,000 being liquidated and ascertained damages under the contract;

(ii) general damages for breach of contract;

(iii) an inquiry as to damages pursuant to the injunction;

(iv) interest at the rate of 14% from the date of wrongful suspension of work to date of judgment;

(v) interest at the rate of 8% from date of judgment to date of realisation.

On 2 July 1987 the plaintiffs/respondents applied for judgment under O. 27 r. 3 of the Rules of the High Court based on a letter dated 4 July 1986 by the defendants/appellants addressed to Lian Seng Properties Sdn. Bhd., - the owners of the building - admitting the plaintiffs/ respondents claim under the three certificates No. 29, 30 and 31. Earlier by letter dated 27 June 1986 the plaintiffs/respondents had complained to Messrs Lian Seng Properties Sdn. Bhd., that the defendants/appellants had failed to pay the sums mentioned in the three certificates:

> The contractor, Messrs Pembinaan KSY Sdn. Bhd., have failed to pay us the sums in respect of the work executed by us and certified in the architects certificates No. 29, 30 and 31 of sums RM139,500, RM241,850 and RM187,400 respectively. These payments are more than five months overdue.

A copy of this letter was sent to Pembinaan KSY Sdn. Bhd., - the defendants/appellants. It was in response to this letter that the defendants/appellants wrote to Messrs Lian Seng Properties Sdn. Bhd., on 4 July 1986 referring to the letter of the plaintiffs/respondents dated 27 June 1986. In this letter of 4 July 1986 to Lian Seng Properties Sdn. Bhd., the defendants/ appellants said:

> We refer to Messrs Federal Furniture AR registered letter dated 27 June 1986 addressed to you and a copy extended to us and which contents are pertaining to their application for direct payments from you for the amount due under the various architects certificates of payment No. 29, 30 and 31. We wish to put on record that our inability to pay the outstanding payments to the nominated sub-contractor is as a result of your failure to honour the progress payments certificates duly.

It was based on this letter of 4 July 1986 by the defendants/appellants to Lian Seng Properties Sdn. Bhd., that the plaintiffs/respondents applied for judgment under O. 27 r. 3.

The learned Senior Assistant Registrar dismissed the plaintiff's/respondent's application for judgment under O. 27 r. 3. But on appeal to the learned Judge the decision of the Senior Assistant Registrar was reversed and judgment was ordered to be entered in favour of the plaintiffs/respondents for the sum claimed in the statement of claim plus interest and costs. The learned Judge also ordered that the counter claim of the defendants/appellants be dismissed with costs.

These orders by the learned Judge were made on 3 February 1988 from which the present appeal has been brought before us.

On appeal the learned Judge was not impressed by certificate No. 40 which was issued a little over a year after the earlier three certificates Nos. 29, 30 and 31 had been issued. In refuting the defendant's/appellant's contention that certificate No. 40 had amended the earlier three certificates by the architect the learned Judge stated that it was not clarified as to how the amendments could contradict the admission by the defendants/appellants in their letter of 4 July 1986 to Messrs Lian Seng Properties Sdn. Bhd., His Lordship referred to *Hudson (Building Engineering Contracts)* 4th Edn., p. 694 that "an architect cannot unilaterally repudiate or invalidate the initial certificate". The learned Judge in his grounds of judgment referred to cls. 11(b) and clause 11(e) of the sub-contract and said:

> Under clause 11(b) the contractor should pay the sub-contractor within 14 days from receipt of certificate from the architect. Again clause 11(e) states that in the event the contractor fails to make the payments in accordance with clause 11(b) within seven days after giving notice the sub-contractor can suspend execution of the sub-contract works until the payments are made and the period during which the works are so suspended will be considered as extended

period to the stipulated period of the completion of the contract. The interpretation which must be given to clause 11(e) therefore is that during the period the suspension is in force the contractor is not permitted to take another sub-contractor to carry on the suspended works; if not, the said clause does not make any sense because it is clear that the object of this clause is to compel the contractor to pay his sub-contractor when the architect has already given his certificate. If the defendants have admitted that the payments have not been made, it is clear that the plaintiff is entitled to stopping works until the said payments are made.

Clause 11(b) and clause 11(e) read as follows:

11(b) Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works and in respect of any authorised variations thereof and in respect of any amounts ascertained under clause 8(c) hereof less:

(i) Retention money, that is to say the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract; and

(ii) The amounts previously paid.

11(e) If the contractor shall fail to make any payment to the sub-contractor as hereinbefore provided and such failure shall continue for seven days after the sub-contractor shall have given the contractor written notice of the same then the sub-contractor may (but without prejudice to any other right or remedy) suspend the further execution of the sub-contract works until such payment shall be made and such period of suspension as aforesaid shall be deemed to be an extension of and be added to the period or periods for completion (as the case may be) as provided in Part II of the appendix to this sub-contract or to any extended period or periods previously authorised under clause 8(b) hereof and shall not be deemed a delay for which the sub-contractor is liable under this sub-contract.

On the evidence before the learned Judge it cannot be said that he had come to any perverse finding and we agree with him that the plaintiffs/respondents are entitled to judgment under O. 27 r. 3 of the Rules of the High Court. However we are of the view that the defendants/appellants counter claim ought not to have been dismissed out of hand merely on affidavit evidence. Their counter claim should go for trial. We accordingly dismiss with costs here and below the appeal against the decision of the learned Judge against the defendants/appellants for the plaintiffs/respondents claim of RM568,750 and RM67,958.61 as interest and direct that the counter claim be heard on its merits.

Also found at [1991] 1 CLJ 678